



## **Agricultural Marketing Service**

### **7 CFR Part 930**

**[Doc. No. AMS-SC-22-0052]**

#### **Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin; Amendments to the Marketing Order**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Proposed Rule.

**SUMMARY:** This proposed rule invites comments on proposed amendments to Marketing Order No. 930, which regulates the handling of tart cherries grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. The proposed amendments would modify the basis for calculating district representation on the Cherry Industry Administrative Board (“Board”), change the starting date for the term of office for Board members, simplify the way a Board member’s sales constituency is determined, clarify how the sales constituency applies to alternate Board members, change the timeframe for submitting nominations, and clarify when districts are subject to volume regulation.

**DATES:** Comments must be received by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** Interested persons are invited to submit written comments concerning this proposed rule. Comments must be sent to the Docket Clerk, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Fax: (202)720-8938; or Internet: <https://www.regulations.gov>. Comments should reference the document number and the date and page number of this issue of the **Federal Register**. All comments will be made available for public inspection in the Office of the Docket Clerk during regular business

hours, or can be viewed at: <https://www.regulations.gov>. All comments submitted in response to this proposed rule will be included in the record and will be made available to the public on the internet at the address provided above. Please be advised that the identity of the individuals or entities submitting the comments will be made public.

**FOR FURTHER INFORMATION CONTACT:** Thomas Nalepa, Marketing Specialist, or Matthew Pavone, Chief, Rulemaking Services Branch, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-8085, Fax: (202) 720-8938, or E-mail: [MarketingOrderComment@usda.gov](mailto:MarketingOrderComment@usda.gov).

Small businesses may request information on complying with this regulation by contacting Richard Lower, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-8085, or Email: [Richard.Lower@usda.gov](mailto:Richard.Lower@usda.gov).

**SUPPLEMENTARY INFORMATION:** This action, pursuant to 5 U.S.C. 553, proposes to amend regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This proposal is issued under Marketing Order No. 930, as amended (7 CFR part 930), regulating the handling of tart cherries grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. Part 930 (referred to as the “Order”) is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the “Act.” The Board locally administers the Order and is comprised of growers and handlers of tart cherries operating within the production area and a public member.

Section 8c(17) of the Act (7 U.S.C 608c(17)) and the applicable rules of practice and procedure governing the formulation of marketing agreements and orders (7 CFR part 900) authorize amendment of the Order through this informal rulemaking action. The Agricultural Marketing Service (AMS) will consider comments received in response

to this proposed rule, and based on all the information available, will determine if Order amendment is warranted. If AMS determines amendment of the Order is warranted, a subsequent proposed rule and notice of referendum would be issued, and producers and handlers would be allowed to vote for or against the proposed amendments. AMS would then issue a final rule effectuating any amendments approved by producers and handlers in the referendum.

AMS is issuing this proposed rule in conformance with Executive Orders 12866, 13563, and 14094. Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 14094 reaffirms, supplements, and updates Executive Order 12866 and further directs agencies to solicit and consider input from a wide range of affected and interested parties through a variety of means. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review.

This proposed rule has been reviewed under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, which requires agencies to consider whether their rulemaking actions would have tribal implications. AMS has determined this proposed rule is unlikely to have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

This proposal has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 8c(15)(A) of the Act (7 U.S.C. 608c(15)(A)), any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and requesting a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed no later than 20 days after the date of entry of the ruling.

Section 1504 of the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) (Pub. L. 110-246) amended section 8c(17) of the Act, which in turn required the addition of supplemental rules of practice to 7 CFR part 900 (73 FR 49307; August 21, 2008). The amendment of section 8c(17) of the Act and the supplemental rules of practice authorize the use of informal rulemaking (5 U.S.C. 553) to amend Federal fruit, vegetable, and nut marketing agreements and orders. AMS may use informal rulemaking to amend marketing orders depending upon the nature and complexity of the proposed amendments, the potential regulatory and economic impacts on affected entities, and any other relevant matters.

AMS has considered these factors and has determined that the amendments proposed herein are not unduly complex and the nature of the proposed amendments is appropriate for utilizing the informal rulemaking process to amend the Order. This proposed rule encompasses a number of changes that are primarily administrative and modernizing in nature. These changes would clarify regulatory text or align it with

current industry practices. Changes would also simplify the administration of seating the Board. In addition, as discussed in the “Initial Regulatory Flexibility Analysis” section below, this proposed rule is not anticipated to impose any new costs on affected entities. The amendments would apply equally to all producers and handlers, regardless of size. The proposed amendments also have no additional impact on the reporting, record-keeping, or compliance costs of small businesses.

The Board unanimously recommended all the proposed amendments to the Order following deliberations at a public meeting held on February 15, 2022, except one dissenting vote on the method for establishing a member’s sales constituency. The Board submitted its formal recommendation to amend the Order through the informal rulemaking process on April 8, 2022. At AMS’s request, the Board conducted an additional meeting on December 15, 2022, to publicly clarify its original intent that the sales constituency provisions of the proposal would apply to both growers and handlers, and that sales constituency would be established at the time of nomination. Specifically, the Board adjusted the language of the initial February 15<sup>th</sup> recommendation for when a member’s sales constituency is established from “nomination and appointment” to just at the time of “nomination.” The Board then unanimously voted to clarify that the established sales constituency applies to both handlers and growers for the duration of the term of office. A separate vote to remove the words “and appointment” from the language had one dissenting individual who believed sales constituency should be calculated at the time of appointment. The proposed rule would:

- Modify the method for allocating Board seats to a district so that it is based on the district’s maximum volume of production in the most recent five harvests (Proposal 1);
- Change the starting date for the term of office for Board members (Proposal 2);
- Modify the basis for determining a Board member’s sales constituency when a member has multiple affiliations (Proposal 3);

- Clarify how sales constituency applies to alternate Board members (Proposal 4);
- Adjust the timeframe for submitting nominations to USDA (Proposal 5); and
- Clarify when districts are subject to the Order's volume regulations (Proposal 6).

### **Proposal 1 – Establishment of membership**

Section 930.20 establishes the Board and provides a method for calculating its membership, which is drawn from nine subdivisions (or “districts”) in the production area. Section 930.20(b) states that district representation on the Board is based on the previous three-year average production in the district and may vary depending on the production levels of the district. If the three-year average production in a district changes, so that a different number of seats should be allocated to it, § 930.20(f) states that the Board's membership must be adjusted accordingly. Currently, the Board is required to calculate the three-year average production in each of the nine districts annually. This updated yearly calculation of the three-year average may result in a change to the number of representative seats in a given district.

This method for determining the Board's membership has proved to be inefficient and costly. If the Board's calculation of the three-year average production in a district reduces the number of seats for the district, the members of that district follow the procedures specified in § 930.120 and recommend to the Board who among them should be removed from office. The Board then makes a recommendation to the Secretary for approval of the member and alternate to be removed from the Board. This process is time-intensive and disrupts the continuity of the Board's operations by removing members and alternates from the Board as frequently as every year. If the new three-year average calculation results in an increase to a district's representation on the Board, the Board staff would conduct an election in that district to fill the newly established seat. This process costs the Board significant time and financial resources because it requires conducting additional outreach and nominations annually. Consequently, the Board

discussed ways to alter § 930.20 to provide a more sustainable method for calculating its membership.

The Board recommended modifying § 930.20(b) so that district representation on the Board is based on each district's maximum production in the most recent five harvest periods, rather than on the district's average production over the previous three years. The Board further recommended that the proposed calculation would commence from the first season's harvest following implementation of this action. In addition, § 930.20(f) would be revised to specify that each district's maximum production for the most recent five harvests would be determined every five years and as soon as possible after the most recent year's production is known. Production numbers would be calculated after the Board receives final reports in early September. The five-harvest periods for calculating maximum volume for each district would continue in perpetuity until otherwise modified through a Board recommendation and rulemaking. The choice of the five-year period is based on balancing the interests of the industry. A five-year period would provide continuity of district representation on the Board, yet it would also allow trends and/or changes impacting tart cherry production to be accommodated periodically.

The Board also recommended amending § 930.20 to insert two new sections, §§ 930.20(g) and 930.20(h). Section 930.20(g) would further clarify that in the event a district experiences substantial changes requiring reconsideration of the number of seats in the district, the Secretary, based on the Board's recommendation, could allocate a different number of seats to the district. In deciding whether to make any such recommendation, the Board would consider several factors. These factors would include shifts in the tart cherry acreage and/or the number of bearing trees within districts and within the production area during recent years, the volume of tart cherries produced in the district, the importance of either increased or decreased production in its relation to existing districts, the equitable relationship of Board membership and districts, enhanced

economies to producers through more efficient administration of Board reapportionments, and other relevant factors.

Additionally, § 930.20(h) would state that no change in the number of seats allocated to a district could become effective less than 30 days prior to the date on which the term of office begins each year, and no recommendation for a change in allocated seats could be made less than six months prior to such date. Current § 930.20(g), (h), and (i) would be redesignated § 930.20(i), (j), and (k), respectively.

The Board considered alternatives to the proposed five-year period for determining a district's maximum production, including 3-year and 10-year periods. The Board assessed each period and cross-compared historical production data to review the hypothetical impact of these options on district representation levels. The Board determined the five-year period calculation as optimal because it induced the least volatility in the seat allocations to each district. Ultimately, the Board believes this proposal would stabilize its composition and improve the efficiency of its operations.

### **Proposal 2 – Starting Date for Term of Office**

Section 930.22 states that the term of office for Board members and alternates is three fiscal years. Section 930.7 defines a fiscal year as the 12-month period beginning on July 1 of any year and ending on June 30 of the following year. These dates have been used as the beginning and end dates for the term of office since the inception of the Order. Proposal 2 would adjust the term of office to start on June 1 and end on May 31 of the third subsequent year. This change would allow for activities such as Board forecasting, planning, and final recommendations for the optimum supply volume to be conducted by the same membership, which industry believes will improve Board operations. The optimum supply volume is referred to by the Board as the Optimum Supply Formula (OSF).

Under the Order's current marketing policy located in § 930.50, the Board is



required to meet on or about July 1 of each crop year to establish a preliminary free market tonnage percentage and a preliminary restricted percentage, and to meet again no later than September 15 to make any modifications to the preliminary percentages based on consideration of actual production data, inventories, and other current economic information. Therefore, the final OSF recommendation incorporates the updated market data, and the Board reviews the preliminary estimates calculated by the prior Board membership during its June meeting (which is when the Board typically holds the meeting required to be held on or about July 1). However, the preliminary recommendation from its June meeting can impact industry operations during harvest in July and August.

Therefore, to establish greater continuity of Board operations that is stabilizing for industry, the Board recommended changing § 930.22 so the term of office would be three years, starting on June 1 and ending on May 31 of the third subsequent year, prior to the start of the crop year. This would allow the same Board members to calculate both the preliminary estimate and the final OSF recommendation.

In addition, the Board usually formulates its budget and assessment rates for the upcoming season at its June meeting. With this change, the newly seated Board would also be making these decisions.

### **Proposal 3 – Determination of Member Sales Constituency**

This proposal would clarify how the term “sales constituency” is applied to growers and handlers. As defined in § 930.16, a sales constituency is a common marketing organization, brokerage firm, or individual representing a group of handlers and growers. An organization that receives consignments of cherries but does not direct where the consigned cherries are sold is not a sales constituency. The determination of a Board member’s (or prospective Board member’s) sales constituency is important because, in a district with multiple Board members, only one member may be from a

given sales constituency. This limitation is intended “to achieve a fair and balanced representation on the Board” and “to prevent any one sales constituency from gaining control of the Board” (7 CFR 930.20(g)).

The lack of additional guidance in the Order relating to sales constituency determinations has created significant challenges. First, the lack of guidance has led to confusion in the industry about how these determinations should be made. In addition, under the current regulatory criteria, Board members and nominees may be found to have multiple sales constituencies since many growers and handlers conduct business with several entities at the same time. Further, these business transactions may change year-to-year, or even within a year. The complicated and volatile nature of sales constituency determinations under the current rules means that Board members may become ineligible to serve before their terms expire, and this contributes to high turnover rates among members. These issues have also made it increasingly difficult to identify qualified candidates to serve on the Board, exacerbating the economic conditions that have caused the tart cherry industry to shrink over time.

The proposal would address these problems by simplifying sales constituency determinations and by providing that such determinations, once made at the time of a prospective member’s nomination, would remain in place until the end of the member’s term of office. Specifically, this proposal would amend § 930.23(b) to provide that a grower’s sales constituency is determined by the handler that purchases the “majority of pounds” of the grower’s cherries at the time of their nomination. A handler’s sales constituency would be the entity that directs the sales of its cherries, which is commonly the handler itself. Sales constituency determinations for growers and handlers would be based on the most recently harvested crop at the time of nomination. This assigned sales constituency would remain in effect throughout the grower’s or handler’s term of office. Since growers and handlers do business with multiple entities, this clarification would

standardize the process for determining sales constituency and ensure that the sales constituency relationship would remain in place throughout a member's three-year term of office. Therefore, the Board recommended this proposal to address industry confusion on how to accurately determine a nominee's sales constituency relationship.

This proposal will help keep the sales constituency static throughout the term of office and stabilize Board membership, thereby reducing turnover interruptions prior to the term of office ending for the member. As explained above, this stability is becoming more important given business attrition and the economic conditions that contribute to the shrinking of the tart cherry industry over time, which has made identifying qualified candidates to serve on the Board increasingly more difficult. In sum, the Board seeks to limit the impact of any single sales constituency and maintain a wide array of perspectives and industry interests while simultaneously incorporating the flexibility to fully seat the Board. This proposal would promote diverse Board representation to reflect industry's business interests while retaining the capacity to seat diverse representation for the entire three-year term of office in each district. This proposal also makes clear that both handlers and growers are subject to sales constituency requirements.

#### **Proposal 4 – Alternate Member Sales Constituency**

Section 930.28 establishes the criteria to seat an alternate member at a Board meeting during the absence of the member for whom that member serves as an alternate. The current language does not include any provision that incorporates sales constituency with regard to alternate members being seated. This proposal clarifies the interpretation of the regulatory language regarding who may represent a member seat within a district, and the intent of industry on nominating and seating an alternate member. When the Order was initially established, the intent of industry regarding sales constituencies was to permit the seating of alternate members even though they were of the same sales constituency as the member for whom they serve as an alternate. It was understood that

members of the same sales constituency could occupy the member and the corresponding alternate seat for that chair on the Board. The proposed amendment would confirm this original interpretation of the sales constituency limitation and clarify when an alternate may serve in place of a member.

Before 2018, the Board's policy was to allow members and their alternates to be from the same sales constituency, even though this practice was not explicitly codified. However, in 2018 a district court issued an order that disapproved of this practice. In *Burnette Foods Inc. v. United States Department of Agriculture*, the United States District Court for the Western District of Michigan held that CherrCo, Inc., a grower cooperative, was a sales constituency. *Burnette Foods, Inc. v. U.S. Dep't of Agriculture*, No. 1:16-cv-21, 2018 WL 538583, at \*4 (W.D. Mich. Jan. 24, 2018). In connection with this holding, the court issued an order stating that "Not more than one Board member (*including an alternate Board member*) may be from, or affiliated with, CherrCo in those districts having more than one seat on the Board." *Burnette Foods*, ECF No. 51 (Mar. 9, 2018) (emphasis added).

USDA's implementation of the district court's order made it difficult to find and seat representatives on the Board who did not have a "constituency conflict" (that is, a shared sales constituency) with other members and alternates on the Board. Under USDA's implementation of the order, sales of cherries by a grower to more than one handler required that all such handler relationships be considered in assessing constituency conflicts. All these grower relationships were compared to all constituencies of other members and alternates serving on the Board from a multi-seat district, including the member holding the seat for which an alternate was standing for nomination and election. With this interpretation, if any conflict existed between a candidate and any other Board representative in the same district, alternates included, the candidate could not be nominated for appointment to the Board.

USDA appealed the district court's decision to the United States Court of Appeals for the Sixth Circuit, which reversed the district court's judgment and remanded the case for entry of judgment in USDA's favor. *Burnette Foods, Inc. v. U.S. Dep't of Agriculture*, 920 F.3d 461, 464, 470 (6th Cir. 2019). However, because the Sixth Circuit ruled in USDA's favor on a preliminary issue, it did not address the question of whether (or how) the sales constituency limitation in § 930.20(g) applies to alternate members.

To clarify this issue, the Board recommended adding language to § 930.28 to explicitly state how the sales constituency limitation applies to alternate members. Currently, § 930.20(g) provides that any conflict of sales constituency in a district for Board members is not allowed. The current language in § 930.20(g) does not address how an alternate's sales constituency affects a member's qualification to serve. The proposed amendment to § 930.28 would add the necessary language to clarify the Board's intentions when seating alternate members.

As previously mentioned, attrition and difficult economic conditions are shrinking the tart cherry industry. In 2021 and 2022, three tart cherry handling operations closed. The Board also recently had open alternate seats as a result of the lawsuit surrounding the sales constituency clause. Finding and electing candidates to serve has become increasingly more difficult. The current process of determining sales constituency adds to this difficulty, especially when a member's sales constituency may change yearly, and the existing process significantly limits the availability of qualified candidates. To seat a functioning Board that appropriately represents growers and handlers from their corresponding districts, the Board believes that members of the same sales constituency must be allowed to sit as member and alternate on the Board. This was commonly understood by industry as how the Order was originally intended to operate. This is also how industry interpreted the Order until 2018.

This amendment would clarify the regulations and confirm these original

intentions and the interpretation of sales constituency for alternates. The proposal would reclassify the original paragraph comprising § 930.28 as § 930.28(a) and add two new paragraphs § 930.28(b) and § 930.28(c). Section 930.28(b) would state that alternate members may be from the same sales constituency as the member for whom they serve as an alternate. It would also provide that, if a member and their alternate are absent from a meeting of the Board, another alternate of a different district may act for the member following the requirements of § 930.28(a), provided this does not create a sales constituency conflict with the other members of that district. Section 930.28(c) would allow the Board, with the approval of the Secretary, to establish rules and regulations necessary and incidental to the administration of § 930.28.

#### **Proposal 5 – Submission of Nominations**

Preparing and completing Board member nomination packages for submission to the Secretary entails several stages of work that require months to complete. The process begins with the issuance of notices of open seats transmitted to industry, followed by the solicitation of nominations in the applicable districts. Grower members and at-large members (i.e., members in districts with only one seat and who may be growers or handlers) are nominated first, then handler members are nominated. Once this is completed, the Board focuses efforts on the nomination of alternate members, a process that adds several more weeks to the timetable.

Currently, the Board is required to announce the expiration of a member's term of office and solicit nominations for the position at least 180 days before the term expires. Board staff must then complete the above-mentioned steps and submit the nomination package to the Secretary or Board at least 120 days before the term expires, in accordance with § 930.23(b)(7). This means the Board may have as few as 60 days (180 days minus 120 days) to prepare and submit a nomination package that adheres to the 120-day deadline. In practice, the Board staff cannot complete the process by the 120-day

deadline. Therefore, the Board has recommended reducing the number of days in advance of a term's expiration that nominations must be submitted from 120 to 60 days. By making the submission date 60 days prior to the end of the term of the outgoing Board member, the Board staff would have an additional 60 days to conduct outreach for nominees and complete the nomination process.

This proposal is an administrative change for the Board. Aside from the proposed change, the Board staff would continue to conduct the nomination and election processes in the same manner as they have been conducted since the inception of the Order. This amendment would adjust by 60 days the deadline for submission of nominations to the Secretary for the selection of the elected members and alternates. This change would not adversely impact the USDA's requirement to carry out the nomination or election processes.

#### **Proposal 6 – Districts Subject to Volume Regulation**

This proposal would change language in § 930.52 to address two industry concerns about how this section establishes which districts are subject to the Order's volume regulations. The first issue involves the number of years that § 930.52(a) considers in determining a district's average production of tart cherries. The second issue involves § 930.52(d)'s exemption from volume regulation based on a district's "processed production," which is an undefined term. These two issues have created confusion when calculating production in a district.

Section 930.52 establishes which districts in the production area are subject to the Order's volume regulations. Section 930.52(a) states that, as a general rule, the districts in which handlers are subject to the volume regulations are those in which the average annual production of cherries over the prior three years has exceeded six million pounds. Handlers become subject to volume regulation in the crop year that follows any three-

year period in which the six-million-pound average production requirement is exceeded in that district.

Currently, the Board uses all tart cherry production for each district in calculating the OSF and for determining whether a district is regulated in any given year. The industry's production information comes from multiple sources. Handlers provide the Board with the amount of fruit that growers deliver to their facilities and from which district produced the fruit. Some growers divert cherries in the field in those years when a restriction is calculated under the OSF. The Board oversees and calculates the volume of cherries diverted from fields by growers. Using all available information, the Board determines the production of tart cherries by district that is used to calculate the OSF for any given year.

Tart cherry production can vary dramatically from year to year, making the production totals extremely volatile over multiple seasons. To make the average calculation for each district less volatile, the Board recommended moving to a five-year average instead of the current three-year average. The additional two years included in the calculation provide a longer window to assess the average production in each district, thereby reducing the weight each season has in determining the average number. The Board further noted that extending the period from three to five years would have a minimal impact on the regulation of the various districts and allow for more consistent averages when calculating the six-million-pound threshold for determining if a district is subject to regulation. Consequently, the Board unanimously recommended changing the period for calculating the average pounds for each district from three to five years in § 930.52(a).

The second issue involves § 930.52(d)'s use of the term "processed production." Section 930.52(d) exempts a district from volume regulation in a particular year if it produces less than 50 percent of its "average annual processed production" in the



previous five years. At present, industry operates with the understanding that in years with volume restriction, grower diverted cherries are subtracted from the district's production when calculating the five-year average. However, since grower diverted cherries represent an insignificant portion of the district's total production, this has a negligible impact on the five-year average. By eliminating the term "processed" from § 930.52(d), it would be clearer to the industry that "production" means all cherries produced in a district when determining the exempt status. Therefore, in years where there is a restriction, all production, including grower diverted cherries, would be part of the production average. This change would simplify the calculation for the Board and keep the calculation consistent in years with and without volume restriction. A district's production average is most impacted by weather conditions from year to year, and not the volume of grower diverted fruit.

Therefore, eliminating the word "processed" from "processed production" would not meaningfully alter the way the industry or the Board are already operating, but it would simplify the five-year production average and make the calculation consistent from year to year. Elimination of the term would also make it clearer to the industry to include all tart cherries produced in a district when determining the regulation status of districts. The Board unanimously recommended this proposed change that would remove the term "processed" from § 930.52(d).

### **Initial Regulatory Flexibility Analysis**

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), AMS has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act are unique in

that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 400 tart cherry growers in the production area and approximately 40 handlers subject to regulation under the Order. At the time this analysis was performed, the Small Business Administration (SBA) defined small agricultural producers of tart cherries as those having annual receipts equal to or less than \$3,500,000 (Other Noncitrus Fruit Farming, North American Industry Classification System Code 111339). Small agricultural service firms were defined as those having annual receipts equal to or less than \$34,000,000 (Postharvest Crop Activities, North American Industry Classification System Code 115114) (13 CFR 121.201).

The National Agricultural Statistics Service (NASS) reported that the 2021-22 value of the tart cherry crop for processed utilization was approximately \$83 million. This tart cherry production was 171.0 million pounds and the season average grower price for processed tart cherries was \$0.485 per pound. Dividing the crop value by the estimated number of producers (400) yields an estimated average annual receipts per producer of \$207,500 (\$83 million divided by 400 producers). This is well below the SBA threshold for small producers.

An estimate of the season average price of \$0.94 per pound received by handlers for processed tart cherries was derived from USDA's purchases of dried tart cherries for feeding programs in the 2021-22 season at an average price of \$4.70 per pound. The dried cherry price was converted to a raw product equivalent price of \$0.94 per pound at an industry recognized ratio of five to one (\$4.70 divided by 5 equals \$0.94). Multiplying this price by 2021 total processed utilization of 171.0 million pounds results in an estimated handler-level tart cherry value of \$160.7 million (\$0.94 per pound multiplied by 171.0 million pounds). Dividing this figure by the number of handlers (40) yields estimated average annual receipts per handler of approximately \$4.0 million

(\$160.7 million divided by 40 handlers), which is well below the SBA threshold of \$34 million for small agricultural service firms. Assuming a normal distribution, the majority of producers and handlers of tart cherries may be classified as small entities.

This proposed rule would revise multiple provisions in the Order's subpart regulating handling of tart cherries grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin:

- Proposal 1: modify the method for allocating Board seats to a district so that it is based on the district's maximum volume of production in the most recent five harvests;
- Proposal 2: change the starting date for the term of office for Board members;
- Proposal 3: modify the basis for determining a Board member's sales constituency when a member has multiple affiliations;
- Proposal 4: clarify how sales constituency applies to alternate Board members;
- Proposal 5: adjust the timeframe for submitting nominations to USDA; and
- Proposal 6: clarify when districts are subject to the Order's volume regulations.

The proposed changes may be considered either modifications of, or clarifications to existing administrative Board processes, and affect only the Board's activity. AMS does not anticipate that any of the proposed changes will increase costs on producers or handlers. The goal of these proposed changes is to help further standardize and stabilize Board membership and improve Board efficiency and decision making throughout the year.

### **Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Order's information collection requirements have been previously approved by OMB and assigned OMB No. 0581-0177, Tart Cherries Grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. No changes in those

requirements are necessary as a result of this proposed rule. Should any changes become necessary, they would be submitted to OMB for approval.

This proposed rule would impose no additional reporting or recordkeeping requirements on either small or large tart cherry handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public-sector agencies.

AMS is committed to complying with the E-Government Act to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this proposed rule.

The Board's meetings are widely publicized throughout the tart cherries production area. All interested persons are invited to attend the meetings and encouraged to participate in Board deliberations on all issues. Like all Board meetings, the meetings held on February 15 and December 15, 2022, were public, and all entities, both large and small, were encouraged to express their views on the proposed amendments.

Interested persons are invited to submit comments on the proposed amendments to the Order, including comments on the regulatory and information collection impacts of this action on small businesses.

Following analysis of any comments received on the amendments in this proposed rule, AMS will evaluate all available information and determine whether to proceed. If appropriate, a proposed rule and notice of referendum would be issued, and growers and handlers would be provided the opportunity to vote for or against the proposed amendments. Information about the referendum, including dates and voter eligibility requirements, would be published in a future issue of the **Federal Register**. A

final rule would then be issued to effectuate any amendments favored by growers and handlers participating in the referendum.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <https://www.ams.usda.gov/rules-regulations/moa/small-businesses>. Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

### **General Findings**

The findings hereinafter set forth are supplementary to the findings and determinations which were previously made in connection with the issuance of Marketing Order 930; and all said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

1. Marketing Order 930 as hereby proposed to be amended and all the terms and conditions thereof, would tend to effectuate the declared policy of the Act;

2. Marketing Order 930 as hereby proposed to be amended regulates the handling of tart cherries grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin and is applicable only to persons in the respective classes of commercial and industrial activity specified in the Order;

3. Marketing Order 930 as hereby proposed to be amended is limited in application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several marketing orders applicable to subdivisions of the production area would not effectively carry out the declared policy of the Act;

4. Marketing Order 930 as hereby proposed to be amended prescribes, insofar as practicable, such different terms applicable to different parts of the production area as are

necessary to give due recognition to the differences in the production and marketing of tart cherries produced or packed in the production area; and

5. All handling of tart cherries grown or handled in the production area, as defined in Marketing Order 930, is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

A 60-day comment period is provided to allow interested persons to respond to these proposals. Any comments received on the amendments proposed in this rule will be analyzed. If AMS determines to proceed based on all the information presented, a producer and handler referendum would be conducted to determine the industry support for the proposed amendments. If appropriate, a final rule would then be issued to effectuate the amendments favored by producers and handlers participating in the referendum.

#### **List of Subjects in 7 CFR Part 930**

Cherries, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Agricultural Marketing Service proposes to amend 7 CFR part 930 as follows:

#### **PART 930 – TART CHERRIES GROWN IN THE STATES OF MICHIGAN, NEW YORK, PENNSYLVANIA, OREGON, UTAH, WASHINGTON, AND WISCONSIN**

1. The authority citation for 7 CFR part 930 continues to read as follows:

**Authority:** 7 U.S.C. 601-674.

2. Amend § 930.20 by:

a. Revising paragraph (b) introductory text, and paragraph (f);

b. Redesignating paragraphs (g), (h), and (i) as paragraphs (i), (j), and (k),

respectively; and

c. Adding new paragraphs (g) and (h).

The revisions and the additions read as follows:

**§ 930.20 Establishment and membership.**

\* \* \* \* \*

(b) District representation on the Board shall be based upon the maximum volume of production in the most recent five harvests in the district and shall be established as follows:

\* \* \* \* \*

(f) If the maximum production for the most recent five harvests in a district changes so that a different number of seats should be allocated to the district, then the Board will be reestablished by the Secretary and such seats will be filled according to the applicable provisions of this part. Each district's maximum production for the five most recent harvests shall be determined every five years and as soon as possible after the most recent year's production is known.

(g) In the event of substantial changes within a district that require reconsideration of the number of seats allocated to the district, the Board may recommend, and pursuant thereto, the Secretary may approve, allocation of a different number of seats to the district. In making any such recommendation, the Board shall consider:

(1) Shifts in tart cherry acreage and/or the number of bearing trees within districts and within the production area during recent years;

(2) The volume of tart cherries produced in the district;

(3) The importance of either increased or decreased production in its relation to existing districts;

(4) The equitable relationship of Board membership and districts;

(5) Economies to result for producers in promoting efficient administration of the Board due to reapportionments;

(6) Other relevant factors.

(h) No change in the allocated number of seats for district(s) may become effective less than 30 days prior to the date on which terms of office begin each year and no recommendation for a change in allocated seats may be made less than six months prior to such date.

\* \* \* \* \*

3. Revise § 930.22 to read as follows:

**§ 930.22 Term of office.**

The term of office of each member and alternate member of the Board shall be for three years beginning on June 1 of the year when appointed and ending on May 31 three years later: Provided that, of the nine initial members and alternates from the combination of Districts 1, 2 and 3, one-third of such initial members and alternates shall serve only one year, one-third of such members and alternates shall serve only two years, and one-third of such members and alternates shall serve three years; and one-half of the initial members and alternates from Districts 4 and 7 shall serve only one year, and one-half of such initial members and alternates shall serve two years (determination of which of the initial members and their alternates shall serve for one, two, or three years shall be by lot). Members and alternate members shall serve in such capacity for the portion of the term of office for which they are selected and have qualified until their respective successors are selected, have qualified, and are appointed. The consecutive terms of office of grower, handler and public members and alternate members shall be limited to two 3-year terms, excluding any initial term lasting less than three years. The term of office of a member and alternate member for the same seat shall be the same. The term of office specified in this section will become effective for all members, including members whose terms are not expiring, upon the first nomination cycle following the effectiveness of the final rule establishing this new term of office.



The Board, with the approval of the Secretary, may establish rules and regulations necessary and incidental to the administration of this section.

4. Amend § 930.23 by revising paragraphs (b)(2) through (4) and (7) and (c)(3)(ii) to read as follows:

**§ 930.23 Nomination and election.**

\* \* \* \* \*

(b) \* \* \*

(2) In order for the name of a handler nominee to appear on an election ballot, the nominee's name must be submitted with a petition form, to be supplied by the Secretary or the Board, which contains the signature of one or more handler(s), other than the nominee, from the nominee's district who is or are eligible to vote in the election and that handle(s) a combined total of no less than five percent (5%) of the previous three-year average production handled in the district. Provided, that this requirement shall not apply if its application would result in a sales constituency conflict as provided in § 930.20(i). The requirement that the petition form be signed by a handler other than the nominee shall not apply in any district where fewer than two handlers are eligible to vote.

(3) Only growers, including duly authorized officers or employees of growers, who are eligible to serve as grower members of the Board shall participate in the nomination of grower members and alternate grower members of the Board. No grower shall participate in the submission of nominees in more than one district during any nomination cycle. If a grower produces cherries in more than one district, that grower may select in which district he or she wishes to participate in the nominations and election process and shall notify the Secretary or the Board of such selection. A grower may not participate in the nomination process in one district and the election process in a second district in the same election cycle. A grower's sales constituency is determined by the common marketing organization or brokerage firm or individual representing a

group of handlers and growers that purchased the majority of pounds of the grower's fruit in a given year. For the duration of a grower's term on the Board, the sales constituency affiliation for said grower will be the affiliation at the time of their nomination and will be based on the most recently harvested crop at that time.

(4) Only handlers, including duly authorized officers or employees of handlers, who are eligible to serve as handler members of the Board shall participate in the nomination of handler members and alternate handler members of the Board. No handler shall participate in the selection of nominees in more than one district during any nomination cycle. If a handler handles cherries in more than one district, that handler may select in which district he or she wishes to participate in the nominations and election process and shall notify the Secretary or the Board of such selection. A handler may not participate in the nominations process in one district and the elections process in a second district in the same election cycle. If a person is a grower and a grower-handler only because some or all of his or her cherries were custom packed, but he or she does not own or lease and operate a processing facility, such person may vote only as a grower. For the duration of a handler's term on the Board, the sales constituency affiliation for said handler will be the affiliation at the time of nomination.

\*\*\*\*\*

(7) After the appointment of the initial Board, the Secretary or the Board shall announce at least 180 days in advance when a Board member's term is expiring and shall solicit nominations for that position in the manner described in this section. Nominations for such position should be submitted to the Secretary or the Board not less than 60 days prior to the expiration of such term.

(c) \* \* \*

(3) \* \* \*

(i) \* \* \*

(ii) To be seated as a handler representative in any district, the successful candidate must receive the support of handler(s) that handled a combined total of no less than five percent (5%) of the previous three-year average production handled in the district; Provided, that this paragraph shall not apply if its application would result in a sales constituency conflict as provided in § 930.20(i).

\* \* \* \* \*

5. Revise § 930.28 to read as follows:

**§ 930.28 Alternate members.**

(a) An alternate member of the Board, during the absence of the member for whom that member serves as an alternate, shall act in the place and stead of such member and perform such other duties as assigned. However, if a member is in attendance at a meeting of the Board, an alternate member may not act in the place and stead of such member. In the event a member and his or her alternate are absent from a meeting of the Board, such member may designate, in writing and prior to the meeting, another alternate to act in his or her place: *Provided*, that such alternate represents the same group (grower or handler) as the member and is not from the same sales constituency as another acting member or acting alternate member in that district. In the event of the death, removal, resignation or disqualification of a member, the alternate shall act for the member until a successor is appointed and has qualified.

(b) Alternate members may be from the same sales constituency as the member for whom they serve as an alternate. In the event a member and his or her alternate are absent from a meeting of the Board, another alternate may act for the member following the requirements of § 930.28(a), provided this does not create a sales constituency conflict with the other members of that district.

(c) The Board, with the approval of the Secretary, may establish rules and regulations necessary and incidental to the administration of this section.

6. Amend § 930.52 by revising paragraphs (a) and (d) to read as follows:

**§ 930.52 Establishment of districts subject to volume regulations.**

(a) The districts in which handlers shall be subject to any volume regulations implemented in accordance with this part shall be those districts in which the average annual production of cherries over the prior 5 years has exceeded 6 million pounds. Handlers shall become subject to volume regulation implemented in accordance with this part in the crop year that follows any 5-year period in which the 6-million-pound average production requirement is exceeded in that district.

\* \* \* \* \*

(d) Any district producing a crop which is less than 50 percent of the average annual production in that district in the previous 5 years would be exempt from any volume regulation if, in that year, a restricted percentage is established.

\* \* \* \* \*

7. Amend § 930.62 by revising the introductory text of paragraph (a) to read as follows:

**§ 930.62 Exempt uses.**

(a) The Board, with the approval of the Secretary, may exempt from the

provisions of §§ 930.41, 930.44, 930.51, 930.53, or 930.55 through 930.57 cherries for designated uses. Such uses may include, but are not limited to:

\* \* \* \* \*

**Erin Morris,**

*Associate Administrator,*

*Agricultural Marketing Service.*

[FR Doc. 2023-26396 Filed: 12/1/2023 8:45 am; Publication Date: 12/4/2023]